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No. 82-131

IN THE

Supreme Court of the United States

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION,
Petitioner,

vs.

HOWARD E. PFEIFER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER

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Questions Presented

1. Whether a longshoreman, who is receiving benefits under the Longshoremen and Harbor Worker's Compensation Act, is entitled to maintain an action against his employer for negligence under §905(b) of the LHWCA, when the employer is the owner or owner *pro hac vice* of the vessel upon which the longshoreman suffered his injuries.

2. Whether federal courts may apply a state's law of damages, or, alternatively, borrow the underlying theory of state law, in calculating the proper measure of damages for future loss of earning, under a federal maritime statute, and, if inflation is a proper consideration, whether the federal courts should disregard expert testimony concerning inflation and adopt a rule of law whereby it is assumed that the rate of inflation will always equal the rate of interest in the future and refuse to discount lost earnings to present value.

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 678 F.2d 453 (3rd Cir. 1982) and is reproduced as Appendix A to the Petition for Writ of Certiorari included herein. The opinion of the United States District Court for the Western District of Pennsylvania has not yet been reported and is reproduced as Appendix B to the Petition for Writ of Certiorari included herein.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). The judgment of the Court of Appeals (App. A, *infra*, 17a) was entered on April 16, 1982. A *sur* petition for rehearing *en banc* was denied on May 20, 1982, with Judge Adams joined by Judge Hunter dissenting (App. A, *infra*, 21a). The certified judgment in lieu of formal mandate was issued on May 28, 1982 (App. A, *infra*, 23a). Appellant's motion for stay of mandate filed on June 2, 1982 was treated as a motion to recall the mandate. The motion was granted and the mandate recalled by Judge Aldisert on June 8, 1982 (App. A, *infra*, 25a). The petition herein was filed on July 14, 1982 and granted on October 4, 1982.

Statutory Provisions Involved

The relevant statutory provisions are §905, subsections (a) and (b), and §933 of the Longshoremen's and Harbor Worker's Compensation Act. These statutory provisions are reproduced in the petition for writ of certiorari at pp. 2-4.

Statement of the Case

Howard E. Pfeifer, respondent, instituted this third party negligence action in District Court alleging jurisdiction on the basis of Section 905(b) of the Longshoremen's Harbor Worker's Compensation Act (LHWCA).

Respondent was employed by Jones & Laughlin (J&L) as a landing helper, working on J&L's coal barges. On January 13, 1978, respondent suffered injuries when he fell on the gunnel of the barge while carrying a motor and breaker box for use in pumping out barges.

Respondent never returned to work after the incident and, at the time of trial, was on a disability pension from J&L for physical impairments which had nothing to do with the incident of January 13, 1978. Pfeifer made a claim for and received payments within the terms of the LHWCA. He then filed the instant negligence action against J&L as the employer vessel owner *pro hac vice* of the barge.

The District Court determined that petitioner, as a vessel owner *pro hac vice*, was liable for negligence under §905(b) of the LHWCA, rejecting petitioner's argument that §905(a) precludes an employers third-party liability where the employer has secured payment of compensation in compliance with §904 of the LHWCA, 33 U.S.C.A. §904. The District Court also held that the recent Pennsylvania Supreme Court case of *Kaczkowski vs. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), dictated that the damages for lost future earnings not be discounted to present value. Finally, the District Court held that damages for future earnings should be factored on the basis of the minimum wage rate instead of wages for light duty work. In reaching this conclusion, the Court rejected petitioner's argument that there is no logical reason why J&L should have been required to offer a light duty position to respondent when the facts adduced at trial showed that respondent was totally disabled and the disability was unrelated to the incident of January 13, 1978.

The Third Circuit Court of Appeals affirmed all three questions on appeal. The appeals court rejected petitioner's §905(b) LHWCA argument on the basis of the holdings in *Griffith vs. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), and *Reed vs. The Yaka*, 373 U.S. 410 (1963).

Likewise, the appeals court rejected petitioner's argument that lost future wages be discounted to present value. And although the Court stated that the holding in the Lower Court was limited to the proper federal measure of damages, it stated later in the opinion that it could find no jurisprudential impediment to the adoption of Pennsylvania's measure of damages. Finally, the Court concluded that the District Court's set-off based on the minimum wage rate was not "clearly erroneous" under the standard of Fed.R.Civ.P. 52(a).

The Court of Appeals denied petitioner's *sur* petition for rehearing on May 20, 1982, and a certified judgment in lieu of mandate was issued on May 28, 1982. Petitioner's motion for stay of mandate was treated as a motion to recall the mandate. Judge Aldisert granted the motion and recalled the mandate in order to allow petitioner the opportunity to petition this Court for writ of certiorari. The certiorari was granted on October 4, 1982, but only to the first two questions: whether the action by an employee against his employer as the owner of a barge was proper under §905(b) of the LHWCA and whether or not the lower courts were correct in applying Pennsylvania law to a federal case of action regarding the proper measure of damages.

Summary of Argument

Petitioner respectfully submits that the lower courts were wrong in allowing the respondent herein to maintain an action in negligence against his employer under §905(b) of LHWCA. In so doing the clear and specific meaning of §905(a) of LHWCA has been ignored. That section states that the longshoreman's exclusive remedy against his employer is limited to compensation payments under the LHWCA. In the instant matter the respondent did in fact receive compensation and is still receiving compensation. This action in negligence under §905(b) was allowed on the basis that the vessel can be sued for negligence. It is the position of the petitioner that the vessel may be sued in negligence but only in a situation where the employer of the injured seaman is not the owner or owner *pro hac vice* of that vessel. To hold otherwise allows a standard of double recovery for the injured longshoreman, one under the compensation benefits and another in a direct negligence action against the employer. It is obvious that, by enacting the 1972 amendments, Congress was attempting to place an injured longshoreman in the same position as land-based employees regarding the ability to file a negligence action against their employers. It is equally obvious that the workmen's compensation laws of the various states have been enacted to ensure that injured employees are compensated while at the same time taking away any right which the injured employee would have to file a direct action against his employer. Based upon the intent of Congress there is no rational reason why the LHWCA should be interpreted any differently, and on that basis Petitioner respectfully submits that the action filed by the respondent in the lower court should have been dismissed.

The second argument raised by the Petitioner is presented in the alternative. The first point is based upon a literal reading of the findings of fact from the lower court in that the recently enacted Pennsylvania law regarding the measure of damages was applied by the district court to this action which was brought pursuant to a federal maritime statute. Pennsylvania law provides that awards for lost future earnings shall not be discounted to present value on the assumption that the discount rate in the future would be equai to the rate of inflation. Petitioner submits that the district court erred in taking this approach, particularly in light of the many cases which set forth that there should be a uniform maritime law under which commerce between the states and with other nations would proceed without interference. By applying the Pennsylvania measure of damages, commonly called the "total off-set" theory, the lower court has completely ignored the mandate of uniformity in maritime law and, if the district court's decision is endorsed, the court has opened the door for forum shopping by injured plaintiffs based upon the various state laws in different jurisdictions.

The Third Circuit Court of Appeals, in affirming the district court's decision, took the position that the district court did not apply Pennsylvania law but merely borrowed the ingredients and applied it to the *Pfeifer* case. In reading this conclusion, it was necessary for the circuit court to completely ignore the findings of the lower court (Joint App. at 74, 75). It is submitted that the court of appeals' conclusion is clearly erroneous. However, even if this Honorable Court agrees with the court of appeals that Pennsylvania law was not applied *per se*, the holding of the circuit court has created an even greater

problem. In using the "total offset" theory, the circuit court has effectively stated that the time honored procedure of reducing loss of earnings to present value has been overturned. *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485 (1916) represents the federal law respecting the proper measure of calculating damages and based upon that case, the award here should have been discounted to present value.

Both lower courts took it upon themselves to decide, without the aid of expert testimony, that the future inflation rates will always equal future interest rates. If the courts are going to consider (or discuss) inflation in calculating awards for lost future income, Petitioner respectfully submits that the evidentiary rule adopted by the Eighth Circuit in *Taenzler vs. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979) should be adopted as the proper federal rule. The *Taenzler* approach avoids speculative inquiries into inflation by allowing the parties to introduce, and the fact-finder to evaluate, relevant expert testimony regarding future merrit and productivity and wage increases of workers engaged in the claimant's specific occupation, in claimant's specific geographic area. Under this approach, the trial court then instructs the fact-finder to reduce the award to present value using the discount rates submitted by the experts at trial. While inflation is a national problem, the *Taenzler* evidentiary approach operates on the irrefutable basis that inflation affects different occupations and areas of the nation differently. In this regard, *Taenzler* provides flexibility where flexibility is needed.

I. §905(a) of the Longshoremen's and Harbor Workers' Compensation Act should be restored to its original meaning and preclude §905(b) third party negligence actions against employer-vessel owners and employer-vessel owner *pro hac vice*.

Section 905(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) provides in part that "[t]*he liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee. . .*" 33 U.S.C.A. §905(a) (emphasis added). Notwithstanding the clear meaning of this language, four circuits have held or indicated *in dicta* that §905(b) affords an injured employee a cause of action in negligence against his employer when the employer is the vessel owner or owner *pro hac vice*. *Griffith vs. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Napoli vs. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); *Complaint of Allied Towing Corp.*, 416 F. Supp. 1207 (E.D. Va. 1976); *Smith vs. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977). Three circuits and the New York Court of Appeals have ruled or indicated *in dicta* that §905(a) imposes an absolute limitation and forecloses §905(b) third party negligence suits by an employee against an employer-owner or owner *pro hac vice*. *Arvidson vs. Dillingham Corp.*, 462 F.2d 1 (9th Cir. 1972); *Murphy vs. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976); *Houston vs. Bechtel Associates Professional Corp.*, 522 F. Supp. 1094 (D.C.D.C. 1981); *O'Rourke vs. Long*, 41 N.Y. 2d 219, 391 N.Y.S.2d 553, 359 N.E.2d 1347 (1976). These courts have taken the approach that §905(a) means exactly what it says, namely, that an

employers' liability for compensation shall be "exclusive and in place of all other liability."

Petitioner respectfully submits that the exclusive liability provision of §905(a) should be restored to its clear and specific meaning. First, the plain meaning of the statute recommends this approach. Second, the legislative history of the 1972 amendments shows that Congress intended to put teeth back into and not to expand the limitation of liability provision: Congress eliminated the unseaworthiness remedy as the *quid pro quo* for the increase in the amount in LHWCA compensation benefits, thereby restoring certainty and predictability to the compensation scheme. Third, since the original enactment of the LHWCA in 1927 and through the 1972 amendments, Congress has strived to insure that injured longshoremen are treated similarly to their land-based counterparts, who are limited to compensation claims against their employers, and there is no sound reason for treating them differently. Finally, the Petitioner submits that insofar as these §905(b) third party negligence suits have arisen out of the courts' concern that injured longshoremen are undercompensated, it is Congress' responsibility to evaluate and correct any deficiencies that may exist; the courts should not be permitted to fashion remedies which thwart Congress' policy determination that employers who provide compensation under the LHWCA shall not be subject to further liability.

From its inception, the LHWCA provided that an employer's liability for compensation under the Act was to be "exclusive and in place of all other liability" to an injured longshoreman or harbor worker. 33 U.S.C. §905 (*as originally designated*). Molded after the New York

Compensation Act, the LHWCA reflects the classic trade-off inherent in such workmen's compensation systems: the worker forfeits his common law right to sue in tort and receives the right to statutory benefits without regard to the employee's contributory negligence or the employer's faultlessness. This guarantees compensation to the injured longshoreman and provides a predictable scheme whereby an employer can adequately insure against its own costs and keep social costs at a minimum.

Four pre-amendment decisions of this Court which have provided a great deal of post-amendment discussion are *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) (Stone, Frankfurter, Burton, JJ. dissenting), *Reed v. The Yaka*, 373 U.S. 410 (1963) (Harlan and Stewart, JJ. dissenting) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967) (Stewart and Harlan, JJ. dissenting); *Ryan Stevedoring Co., Inc. vs. Pan-Atlantic S.S. Corp.*, 349 U.S. 926 (1955).

In *Sieracki*, this Court held that while Congress intended the remedy of compensation to be exclusive as against the employer, it did not intend this remedy to affect others against third persons, and, in particular, permitted the stevedore to pursue his unseaworthiness claim against the ship owner who was not the employer. This Court continued by stating:

> "The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, *Except possibly in the instance, presumably rare, where he may be hired by the owner,*" 328 U.S. at 102 (emphasis added).

Sieracki, therefore, made it possible for the longshoreman's employer to recover the amount of

LHWCA benefits he was obliged to pay to his employee from the shipowner where the shipowner's breach of seaworthiness caused the employee's injury.

In *Ryan*, this Court held that a shipowner who was forced to pay off a *Sieracki* claim brought by a longshoreman injured by the unsafe stowage of cargo could recover full indemnity from the longshoreman's employer, a stevedoring concern, if a breach of the latter's warranty of workmanlike performance contributed to the injury. *Ryan*, therefore, removed as a practical matter the protection afforded an employer under §905, since the stevedore became indirectly liable for its employee's injuries.

In *Yaka*, the injured longshoreman was employed directly by the vessel owner *pro hac vice*. Justice Black, speaking for the Court, announced that the owner *pro hac vice* should not be allowed to avoid the obligation of seaworthiness. The effect of the holding in *Yaka* was to emasculate the exclusivity provisions of the LHWCA in order to avoid, what the Court termed, "harsh and incongruous results" in light of its previous holdings in *Sieracki* and *Ryan*. 373 U.S. at 415. *Yaka* was later endorsed in *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731 (1967), where this Court, when faced with a nearly identical situation, once again held that the exclusivity provision of the LHWCA did not defeat an action against the employer-vessel owner for unseaworthiness.

When Congress amended the LHWCA in 1972, it was acutely aware of those decisions discussed above, and it greatly increased the benefits available under the Act. It redesigned §905 into two parts to be read together. Congress designated §905(a) as the exclusivity provision and added §905(b).

> "in the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person * * * may bring an action against such vessel as a third party in accordance with provision of section 933 of this title *and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.* If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time of the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."
> 33 U.S.C. §905(b). (emphasis supplied).

Section 905(b) replaces the longshoreman's unseaworthiness action with a negligence action and eliminates the vessel's right to seek indemnity from the injured plaintiff's employer. The effect of this section is, as Mr. Justice Marshall noted in *Cooper Stevedoring Company Inc. vs. Fritz Kopke, Inc.*, 417 U.S. 108, 113 n.6 (1974), that *Sieracki* and *Ryan* are annulled. Furthermore, the apparent purpose of the second and third sentences in §905(b) was to reverse *Yaka. G. Gilmore & C. Black, The Law of Admiralty*, 450 (2d ed. 1975).

The Ninth Circuit, while recognizing that *Yaka* permitted a longshoreman to sue the ship owner-employer directly, has held that this particular right of recovery is

limited to the unseaworthiness context. *Arvidson vs. Dillingham Corp.*, 462 F.2d 1, 4 (1972). As a Ninth Circuit District Court later suggested in *Baker vs. Pacific Far East Lines, Inc.*, 451 F. Supp. (N.D. Calif. 1978), the following language from *Cooper, supra*, indicates that this Court agrees:

> "[E]ven if Erie were negligent, its injured employee was entitled to claim compensation from it under the Harbor Workers' Act, and Erie was accordingly entitled to the protective mantle of the Act's limitation-of-liability provision." *Cooper*, 417 U.S. at 115 (1974).

Petitioner submits that the clear and specific meaning of the language of §905(a) compels the conclusion that Congress intended that employers would not be subject to direct negligence suits by employees under §905(b). The only exception provided for by the Act is where the employer fails to secure compensation within the terms of §904. As the Third Circuit Court of Appeals conceded in *Griffith*, there is no exception for §905(b) liability where the party is both the employer and the vessel. *Griffith* and its progeny have allowed §905(b) actions by creating a legal fiction in that an employer-vessel owner is considered as two entities for the limited purpose of §905(b) actions against employers.

The legislative history of the 1972 amendments, evinces Congress' intent to restore the exclusivity provision to its *pre-Sieracki-Ryan* position. This Court has examined the amendments and in *Cooper, supra*, Mr. Justice Marshall wrote:

> ". . .[T]he 1972 amendments to the Harbor Workers' Act re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation under the Act

should be the employee's exclusive remedy." 417 U.S. at 112-113.

Furthermore, the Congressional Committee responsible for holding hearings and overseeing the drafting of the 1972 amendments stated that:

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness,' 'nondelegable duty,' or the like," *S. Rep. No.* 1125 at 10 (1972).

Later, the Committee commented:

> ". . . The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party then is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." *S. Rep. No.* 1125 at 11 (1972).

The legislative history is replete with expressions that rejuvination of the exclusivity provision and the elimination of the unseaworthiness action were the *quid pro quo* for the substantial increase in LHWCA benefits. *See, e.g., S. Rep. No. 1125, 92d Cong., 2d Sess. 4* (1972); *H.R. Rep. No. 1441, 92d Cong. 2d Sess. at* 4699, *reprinted in* [1972] *U.S. Code Cong. & Admin. News* pp. 4698-9, 4705; 118 *Cong. Rec.* 36381-3 (1972).

Closely related is the fact that the LHWCA was designed as a typical workers' compensation scheme and was modeled after New York's system. This has prompted at least two courts to remark that the LHWCA, like its state counterparts, reflects the classic trade-off between the certainty of benefits for the injured employee and the limitation of the employer's liability. *Murphy v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 545 F.2d at 238; *Baker v. Pacific Far East Lines, Inc.*, 451 F. Supp. at 95-6; *See also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, _____ (1977). Likewise, under state compensation systems, the employees, claim for compensation represents the full extent of the employer's liability for all injuries resulting from unintentional misconduct. *See*, 2A A. *Larson, The Law of Workmen's Compensation*, §68.13 at 13-5 (1952). Importantly, New York is in accord.

In that regard, the Petitioner submits that the right to bring an action against a vessel as a third party, exists only where the vessel owner to one other than the plaintiff's employer. To hold otherwise has two immediate effects. It first of all, completely negates §905(a) of the LHWCA which provides the exclusivity provision for longshoremen. This is particularly true where, as in the instant case, payments are still being made under the LHWCA. Secondly, there is a provision in §905(b) which states ". . . the employer shall not be liable to the vessel. . ." to allow such an action against the vessel, when the vessel is owned by the employer, nullifys the existence of the aforesaid provision. As a practical matter in the event of liability of the vessel, the employer is then called upon to pay on behalf of the vessel under

Griffith. Certainly Congress had to intend that an action against the vessel could only be sustained in a three-party situation. If the intent was different, the amendments allowed an increase in benefits for the longshoremen while deluding the exclusivity provision. The legislative history indicates that was not the intent. *O'Rourke v. Long*, 41 N.Y. 2d 219, 391 N.Y.S. 2d 553, 359 N.E.2d 1347 (1976). Given Congress' intent to provide injured longshoremen the same treatment as their land-based counter-parts, courts which have allowed §905(b) suits against employer-vessel owners and owners *pro hac vice* have violated the underlying principles of the LHWCA.

Finally, Petitioner asserts that insofar as these §905(b) negligence suits have arisen out of some courts' concern that injured longshoremen are undercompensated, it is Congress' duty to re-evaluate the compensation system provided by the LHWCA and to amend it if Congress deems it necessary. The benefits paid under the LHWCA are near the top if not at the top of all compensation programs. In the words of Mr. Justice Harlan in his dissent in *Yaka*, "there is an outer limit beyond which judicial construction of the language of a statute ought not to go." Petitioner respectfully submits that the limit has been exceeded here and implores this Honorable Court to restore the protective mantle of the §905(a) exclusive liability provision in cases where the owner or owner *pro hac vice* is also the injured longshoreman's employer.

II. (a) The lower courts erred by applying Pennsylvania law since the measure of damages for lost future wages under this federal maritime cause of action should have been determined as a matter of federal law.

The second point for review is Petitioner's contention that the District Court should not have applied the Pennsylvania rule of *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) in assessing damages in this maritime action. The case held that:

> "Moreover, we find as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting. Thus, the courts of this Commonwealth are instructed to abandon the practice of discounting lost future earnings."

Petitioner submits that *per se* application of state damages law to a federally created right violates the constitutional mandate of uniformity under Article III, §2, and frustrates Congress' intent that maritime matters be resolved as a matter of federal law. Alternatively, assuming that the District Court merely borrowed the underlying theory of *Kaczkowski, Pfeifer* cannot stand because *Chesapeake & Ohio Railway Co. vs. Kelly*, 241 U.S. 485 (1916) requires that damages for lost future earnings be reduced to present value. If inflation is to be considered, Petitioner submits that the evidentiary rule adopted by the Eighth Circuit in *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979) should be adopted as the proper guideline. The lower court in that case disallowed expert testimony directly predicting a particular future inflation rate and allowed, instead, expert testimony on future wage increases of a particular group of employees. The Trial Court then instructed on reduction to present value. Thus, the jury's considerations involved a specific

group of employees in a specific geographic area, rather than being harnessed with speculative rates of inflation and other collateral problems.

Petitioner respectfully disagrees with the Court of Appeals' determination that the District Court applied the proper federal law and federal measure of damages. *Pfeifer*, 678 F.2d at 456-7. An examination of Judge Cohill's conclusions of law reveals that the learned judge felt bound by and compelled to apply the recently enunciated rule of damages set forth in *Kaczkowski*. Referring to Respondent's proffer of cost of living raises, the judge stated that these projections were "inappropriate in view of the holding in *Kaczkowski*" and that it "would be inconsistent with the *Kaczkowski* decision" to consider cost of living increases. Joint App. at 74, 75. The Court of Appeals' finding that the lower court did not actually apply state law is contrary to the lower court's stated conclusions of law and, therefore, should not distract this Court from examining on the merits, the propriety of applying state damages law to a cause of action under the LHWCA. Further, even if this Court were to conclude that state law was not applied, it is respectfully submitted that the lower courts were wrong in allowing this measure of damages.

Because this cause of action arises under the maritime law, the damages issue should be decided under federal rather than state law. *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1971), *cert. denied*, 402 U.S. 987 (1971); *Canova v. Travelers Insurance Co.*, 406 F.2d 410 (5th Cir. 1969), *cert. denied*, 396 U.S. 932 (1969). This Court has long recognized that the Constitution has specifically placed maritime torts under national power to control "its substantive as well as its

procedural features ***." *Panama R. Co. v. Johnson*, 264 U.S. 375 ( ). In *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875), this Court recognized that the framers envisioned a uniform and consistent system of maritime law under which commerce between the states and with other nations would proceed without interference. The holding in *Pfeifer* mandates that the measure of a longshoreman's recovery and a shipowner's exposure to liability would depend on the state law of the particular port where the injury occurs or the law of the jurisdiction in which the defendant is otherwise subject to service of process. Petitioner submits that this almost certain inconsistency in the application of maritime law is exactly what the Court has traditionally sought to avoid. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Pope & Talbot, Inc. vs. Hawn*, 346 U.S. 406 (1953).

Petitioner recognizes that this Court has occasionally modified or supplemented general maritime law by applying state law. This is especially true where the federal law of admiralty is incomplete. *Just vs. Chambers*, 312 U.S. 383 (1941); *Southeastern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *M/V Tungus vs. Skovgard*, 358 U.S. 588 (1959); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 ( ). The issue of damage law was settled in *Kelly*. Moreover, this Court has consistently refused to apply state law where it contravenes an act of Congress, prejudices the characteristic features of maritime law or disrupts the harmony it strives to bring to international and interstate relations. *Just*, 312 U.S. at 389-90; *Jensen*, 244 U.S. at 216; *J. Ray McDermott & Co., Inc. vs. Vessel Morning Star*, 457 F.2d 815 (5th Cir. 1972), *cert. denied*, 409 U.S. 948 (1972). Furthermore, state law is inappropriate where it contravenes the uniformity of the admiralty law in some crucial

respect. *In re M/T Alva Cape*, 405 F.2d 962 (2d Cir. 1969); *Branch v. Schumann*, 445 F.2d 175 (5th Cir. 1971).

Referring to the above quoted principles, Petitioner submits that *Pfeifer* cannot stand. First, the legislative history of the 1972 amendments clearly indicates Congress' intent that the legal rate of measure of damages under the LHWCA be calculated according to federal law. In this respect, the Committee stated:

> "The Committee intends that *legal questions* which may arise in actions brought under these provisions [negligence remedy] of the law *shall be determined as a matter of Federal law.*" *S. Rep. No.* 1125 at 12 (1972) (emphasis added).

In light of this language, *Pfeifer* plainly contravenes Congress' intent. Second, the general maritime law is complete in every respect as to damages: *Kelly* requires federal courts to discount an award of lost future earnings to present value and thus, Respondent's reliance on *M/V Tungus* and *St. Hilaire Moye* is misplaced. Finally, the application of state law here would disrupt the harmony which federal maritime law must maintain in order to issue the free flow of commerce. The constitutional uniformity mandate of Article III, §2 could not be clearer.

II. (b) If inflation is a proper consideration in determining the amount of lost future wages, this Court should endorse as a uniform rule the evidentiary approach adopted by the Eighth Circuit Court of Appeals.

Assuming, *arguendo*, that the lower courts merely borrowed the underlying theory of *Kaczkowski*, the time is ripe for a reaffirmation from this Court on the vitality of *Kelly* and its requirement of reduction to present value.

Petitioner contends that *Kelly* continues to be a viable rule, and one which, when applied in conjunction with the approach taken by the Eighth Circuit in *Taenzler v. Burlington Northern, supra*, provides an equitable and judicially managable solution. Since the Fifth Circuit has recently undertaken an exhaustive survey of the federal courts' different approaches to inflation valuation in *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982). Petitioner does not attempt to do so here.

Instead, Petitioner focuses its analysis on two points: First, Petitioner submits that the "total offset" method, commonly known as the Alaskan rule, which was adopted in *Kaczkowski*, represents an inflexible and inequitable approach and one which this Honorable Court should reject outright. Second, the *Kelly* rule remains a viable rule. This Court should reaffirm the concept of discounting to present value. Once the award is received, the plaintiff is responsible for making the proper investments. In any event, Petitioner respectfully submits that at most the Court should endorse the *Taenzler* evidentiary approach instead of entertaining speculative inquiries into future inflationary trends. *Taenzler* permits the fact-finder to evaluate competent evidence regarding *merit and productivity* increases, and then discounts to present value, thereby insuring fairness to both litigants. Further, the fact-finder may also consider the past wage history of the plaintiff together with the past, present and future of the industry of the plaintiff, here, the steel industry.

There was no reason to adopt the Alaskan rule of *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967). Under this rule inflation is *presumed equal* to the discount rate. The Alaska and Pennsylvania Supreme Courts assert that the advantage of this rule is its simplicity, predict-

ability and economy of effort. But, as one of several commentators has observed, this rule "ignores rather than enhances predictability." Note, *Considering Inflation in Calculating Lost Future Earnings*, 18 Washburn L.J. 499, 509 (1979). The rule provides a windfall to the plaintiff because interest rates on relatively safe investments will typically ride several percentage points above the inflation rate. This approach also ignores future probable wage & productivity increases thereby introducing a very great probability of error, since it is common knowledge that the average wage increases of most American workers does not keep pace with the rate of inflation. Depending upon a worker's particular occupation, he will be either penalized or realize a windfall. *Culver*, 688 F.2d at 296-98, N. 21-22.

Finally, this Court should reject the Alaskan rule because it usurps the traditional role of the fact-finder in favor of an inflexible rule of law, and many times the learned court is the fact-finder. There is no great logic in denying the fact-finder the opportunity to examine competent and credible economic evidence of merit and productivity increases when fact-finders have proven to be competent in evaluating medical and other scientific expert testimony. To impose such a rule is to greatly underestimate the intelligence of fact-finders.

The *Taenzler* approach, preserves the traditional role of the fact-finder by permitting competent evidence regarding future wage increases, and then that sum is reduced to present value. In this aspect, *Taenzler* is consistent with this Court's holdings in *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968) and *Kelly, supra*. This approach results in greater accuracy because it keys on the injured claimant's specific *occupation* and *geographic location* in

determining lost future income, while removing from consideration the very speculative prediction of future inflation. The locale and changing conditions are taken into consideration. It is Peititioner's contention that since an injured claimant's potential lost future wages will rarely mirror the inflation rate, a search for an interest rate which incorporates inflation and discount rates is *inappropriate.*

The relevance and ultimate admissibility of economic data to prove the likelihood of future wage loss should depend, as the *Taenzler* court recommends, on the Federal Rules of Evidence. It should be kept in mind that the record in this matter is completely devoid of any evidence of inflation. There was evidence regarding wages paid under union contracts admitted, although plaintiff's Exhibit No. 7 was never admitted into evidence. This Honorable Court must look at the facts in issue in the instant case. The lower court, without the aid of expert testimony, assumed a rigid, inflexible proposition regarding damages. It is submitted that what should be looked at in the review of this case is the factual record from the Court below, in relation to the legal issues raised on this appeal. Ultimately, there are no facts to sustain the Court's legal conclusions.

Conclusion

The Petitioner respectfully requests that this Honorable Court reverse the lower courts' decisions. Based upon a proper interpretation of §905(b) of the LHWCA, this action by Respondent should have been dismissed at the lower court or court of appeals' level.

Should this Honorable Court decide the first issue in favor of Respondent, Petitioner submits it is entitled to a remand to the lower court for a trial on damages, under the proper evidentiary rules and standards.

Dated: November 12, 1982.

Respectfully submitted,

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